Stephen H.M. Bloch #7813
Tiffany Bartz # 12324
SOUTHERN UTAH WILDERNESS ALLIANCE
425 East 100 South
Salt Lake City, UT 84111
Telephone: (801) 486-3161

Walton Morris, *pro hac vice*
MORRIS LAW OFFICE, P.C.
1901 Pheasant Lane
Charlottesville, VA 22901
Telephone (434) 293-6616

Sharon Buccino, *pro hac vice*
NATURAL RESOURCES DEFENSE COUNCIL
1200 New York Ave., NW, Suite 400
Washington, DC 20005
Telephone: (202) 289-6868

BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

UTAH CHAPTER OF THE SIERRA CLUB, et al.,

Petitioners,

Docket No. 2009-019
Cause No. C/025/0005

DIVISION OF OIL, GAS AND MINING,

Respondent, and

ALTON COAL DEVELOPMENT, LLC,

Intervenor-Respondent..

PETITIONERS' BRIEF ON THE SCOPE OF REVIEW

In response to this Board's December 17, 2009, minute order, Utah Chapter of the Sierra Club ("Sierra Club"), Southern Utah Wilderness Alliance ("SUWA"), Natural Resources Defense Council ("NRDC"), and National Park Conservation Association ("NPCA")(collectively,

"Petitioners") file this brief concerning the proper scope of the Board's review in this proceeding, including (1) whether the hearing may or should be confined to the record of the Division's proceedings or should involve the taking of additional evidence and (2) what level of deference, if any, the Board should afford the Division's findings and decision. In Petitioners' view, the August 9, 2007, order that this Board entered in *Southern Utah Wilderness Alliance v. Division of Oil, Gas & Mining et al.*, Docket No. 2007-015, Cause No. C/007/13-LCE07 (hereinafter, "the *Lila Canyon* order"), clearly and correctly resolved the scope of review issue in this and all other subsequent challenges to decisions of the Division of Oil, Gas and Mining to approve coal mining permit applications. Moreover, the scope of review identified in the *Lila Canyon* order and the need to maintain consistency with federal administrative review procedures necessarily requires that this Board hear and determine challenges to the Division's permit approval decisions *de novo*, without deference to the Division's interpretations of law and with only limited deference to the Division's technical experts..

The doctrine of *stare decisis* strongly supports continued adherence to the principles established in the *Lila Canyon* order because there is no reasonable basis for overruling the Board's prior decision on the issues that the Board has requested the parties to address. *See Salt Lake Citizen's Congress v. Mtn. States Tel. & Tel. Co.*, 846 P.2d 1245, 1253 (Utah 1995) (noting the authority of administrative agencies to overrule a prior decision only "when there is a reasonable basis for doing so"). Accordingly, Petitioners urge the Board (1) to reaffirm the pertinent principles announced in the *Lila Canyon* order, (2) to hold that the *de novo* scope of the Board's review and the need to maintain consistency with federal administrative review procedures permits only limited deference to the Division's technical analyses or findings, and (3) to conduct the remainder of these proceedings in accordance with those principles.

I.

The Governing Principles Established in the *Lila Canyon* Order

The *Lila Canyon* order itself reversed the Board's prior decision that the appropriate scope of review in proceedings such as this one is appellate in nature, with no latitude accorded the parties to develop evidence in addition to the record of proceedings before the Division. Citing *Salt Lake Citizen's Congress* and other case law, the Board concluded that a reasonable basis existed to abandon its previous ruling on scope of review because "**such a scope of review is contrary to the statutes which control the Board** and would preclude the development of a record adequate for purposes of judicial appellate review of the Board's decision." *Lila Canyon* Order at 5 (emphasis supplied). The Board further explained that "the interests of efficiency and consistency [served by continuing to follow prior decisions on an issue] do not outweigh the necessity of the Board engaging in the **proper** scope of review **as mandated by law** . . . ." *Id.* at 6 (emphasis supplied).

The Board went on to hold correctly that "[t]he provisions of the Utah Coal Mining & Reclamation Act (the "Coal Act") [Utah Code Ann. § 40-10-1, *et seq.*], Utah Oil and Gas Conservation Act (the "Conservation Act") [Utah Code Ann § 40-6- 1, *et seq.*], Utah Administrative Procedures Act ("UAPA") [Utah Code Ann §63-46b-l, *et seq.*], the Board's procedural rules, and Utah decisional law construing these statutory and regulatory provisions, all compel the conclusion that the Board, in conducting a 'hearing' pursuant to Utah Code Ann. §40-10-14(3), does not limit its review to an informal record developed before the Division, but rather conducts a formal evidentiary hearing in which evidence is taken and an adequate record is developed for purposes of judicial appellate review." Focusing on the Coal Act, the Board properly held that:

> Section 14 of the Coal Act further states that for "purpose[s] of the hearing, the board may administer oaths, subpoena witnesses or written or printed materials, compel attendance of the witnesses or production of materials, and take evidence, including,

> but not limited to, site inspections of the land to be affected and other surface coal mining operations carried on by the applicant in the general vicinity of the proposed operation" *Id.* at § 14(5). This language clearly contemplates the taking of evidence and does not contemplate the Board merely reviewing an informal record. Section 14 further states the Board shall conduct the hearing "pursuant to the rules of practice and procedure of the board" (which as discussed below, also explicitly speak in terms of taking evidence).

Lila Canyon order at 9. Reviewing its own rules, this Board noted that:

> The Board's rules provide that hearings are "formal adjudicative proceedings," *see* Utah Admin. Code R641-100-100, governed by UAPA, *see* R641-100-500, in which all parties "will be entitled to introduce evidence, [and] examine and cross-examine witnesses," *see* R641-101-200, and which shall be conducted "to obtain full disclosure of relevant facts," *see* R64I-108-100, The Board's rules speak of receiving documentary evidence, *see* R64I-108-200, receiving testimony, *see* R641-108-300, subpoenaing witnesses and documents, *see* R641-108-900, and permitting discovery, *see* R641-108-800. Again, these provisions contemplate formal evidentiary hearings where evidence is taken, and not proceedings which are limited to an informal record developed at the Division level.

Lila Canyon order at 10-11. Turning to the text of the UAPA, the Board pointed out that the statute:

> defines formal adjudicative proceedings as hearings conducted "to obtain full disclosure of relevant facts," in which the presiding officer will permit parties "to present evidence," and in which "testimony" and "documentary evidence" will be received, Utah Code Ann. §63-46b-8(1). Again, this language clearly contemplates an evidentiary hearing not restricted to the Division's informal record.

Lila Canyon order at 11. Reviewing the pertinent case law, the Board noted the ruling in *Cordova v. Blackstock,* 861 P.2d 449, 451-52 (Utah 1993) that "[f]ormal proceedings allow the opportunity for **fuller discovery** and fact finding, [and] are more likely to result in an adequate record for review." (Emphasis supplied; internal quotation marks omitted.) Summing up its review of the applicable law, the Board concluded that:

> Ultimately, there is no support in the Coal Act, UAPA, the Board's organic act, or any of the rules promulgated thereunder, for the proposition that the Board must assume the role of an appellate court, and strictly limit its review to an informal agency record, when it reviews a Division coal mine permitting decision. Such a procedure is not only contrary to the above referenced statutes and rules, but would result in a scheme in which an informal agency decision was then twice reviewed

> under appellate standards (first by the Board and then by the Supreme Court) without a formal evidentiary hearing having ever been conducted, a scheme UAPA was meant to eliminate.

Lila Canyon order at 13.

As a result of this thorough review of the entire body of applicable law, the Board ruled that it would:

> hold a formal adjudication in this matter in which it will review (1) the evidence which was made available to the Division during its permit review process, and (2) other relevant evidence and information not considered by the Division, in order to make its own findings of fact and conclusions of law concerning the legal and factual issues which were involved in the Division's decision. Based upon this evidence, the Board will issue a "written decision . . . granting or denying the permit in whole or in part." Utah Code Ann. §40-10-14(3).

Lila Canyon order at 14.[1]

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[1] Subsequently in the same case, this Board held that the scope of review and nature of formal adjudicative proceedings favor discovery in hearings on challenges to coal mine permit approvals and that "[t]he Board's ruling concerning the appropriate scope of review in this formal adjudication therefore **obligates** the parties to themselves obtain the documents they wish to offer into evidence rather than relying on any pre-existing 'record' . . . ." *Southern Utah Wilderness Alliance v. Division of Oil, Gas & Mining et al.*, Docket No. 2007-015, Cause No. C/007/13-LCE07 ("Order Concerning Discovery") (Sept. 5, 2007) at 4-5. Although Petitioners believe that the Board may have suggested at the December 9, 2009, initial hearing in this case that the parties address the availability and nature of discovery in the briefs to be submitted on December 29, 2009, the Board's December 17, 2009, minute order makes no mention of the discovery issue. To the extent that the minute order reflects a determination that briefing of discovery issues, if any, be postponed until after the Board decides the scope of its review, Petitioners concur and therefore do not address discovery exhaustively in this brief. To the extent that Petitioners misunderstand the Board's minute order, they state here for the record that the same *stare decisis* principle that supports continued application of the *Lila Canyon* order also supports continued application of the discovery principles announced subsequently in that case. Petitioners submit that, following the Board's decision on scope of review in this case, the parties be permitted to brief the issue of the appropriate extent of discovery in light of the Board's decision on scope of review.

II.

Stare Decisis* Mandates Application of the Principles Announced in *Lila Canyon

The law in Utah concerning application of the doctrine of *stare decisis* to decisions of administrative agencies is stated in *Salt Lake Citizen's Congress v. Mtn. States Tel. & Tel. Co.*, 846 P.2d at 1252-53, where the Supreme Court of Utah held:

> The adjudication of every case requires the application of one or more rules of law. A rule of law, whether pre-existing or newly established, that serves as the major premise of an adjudicatory syllogism, necessarily governs all subsequent cases properly falling within the scope of the rule. This is so even when the particular facts in subsequent cases are different and res judicata does not apply.
>
> . . .
>
> The doctrine of stare decisis, properly applied, is an essential component in establishing the rule of law in the arena of administrative law.
>
> . . .
>
> Rules of law developed in the context of agency adjudication are as binding as those promulgated by agency rule making. Thus, rules of law established by adjudication apply to the future conduct of all persons subject to the jurisdiction of an administrative agency, unless and until expressly altered by statute, rule, or agency decision.

(Internal citation omitted.) Since the Utah Supreme Court handed down the decision in *Salt Lake Citizen's Congress*, Utah appellate courts have reaffirmed the principles quoted above on numerous occasions. *Steiner Corp. v. Auditing Div. of Utah State Tax Comm'n*, 979 P.2d 357, 361 (Utah 1999); *Mountain Fuel Supply Co. v. Public Service Comm'n of Utah*, 861 P.2d 414, 420 (Utah 1993); *State v. Shoulderblade*, 858 P.2d 1049, 1052 (Utah App. 1993); *Pickett v. Utah Dept. of Commerce, Div. of Occupational and Professional Licensing*, 858 P.2d 187, 190 n.7 (Utah App. 1993).

Accordingly, the *Lila Canyon* order "necessarily governs all subsequent cases properly falling within the scope of the rule." Because this case is precisely the same sort of proceeding as the permit approval challenge that produced the *Lila Canyon* order, it unquestionably falls within the scope of the rule that this Board adopted.

Petitioners recognize that "[a]dministrative agencies must, and do, have the power to overrule a prior decision when there is a reasonable basis for doing so." *Salt Lake Citizen's Congress v. Mtn. States Tel. & Tel. Co.*, 846 P.2d at 1253; *Board of Equalization of Salt Lake County v. First Sec. Leasing Co.*, 881 P.2d 877, 879 (Utah 1994). Here, however, there is no reasonable basis for overruling the *Lila Canyon* order. The pertinent statutes and regulations remain as they were when the Board issued that order. The applicable case law has not changed. The public interest considerations that underlie the process of administrative challenges to the Division's permit approval decisions have not changed. In the absence of change in any of these factors, there simply can be no "reasonable basis" for overruling the *Lila Canyon* order.

The fact that the permittee in this proceeding, Alton Coal Development, LLC ("ACD"), has expressed a clear preference for a different and potentially more expeditious type of proceeding than the one "**mandated by law**" – according to the *Lila Canyon* order – simply does not supply a "reasonable basis" for concluding that the same statutes and regulations that the Board throughly analyzed in issuing the *Lila Canyon* order ought now be interpreted differently. A ruling to the contrary here would allow the "reasonable basis" exception to swallow the rule and eviscerate the doctrine of administrative *stare decisis* altogether. Petitioners accordingly request the Board to reaffirm the *Lila Canyon* order and conduct this proceeding as a *de novo* adjudication of the issues that Petitioners have raised with respect to the approval of ACD's permit application.

III.

The Board May Not Lawfully Defer to the Division's Interpretation of Law

The regulations governing formal administrative adjudication of challenges to the Division's decisions to approve coal mine permit applications make this Board the final decision-making authority with respect to issuance of the requested permit. Utah Admin. Code § R645-300-212.400. Petitioners have found nothing in the governing regulations, or in the statutes from which they derive, that authorizes or requires the Board to defer to the Division's interpretation of the law. Moreover, the Board's status as final decision maker, combined with the *de novo* nature of permit review proceedings established by the *Lila Canyon* order, makes deference to the Division's interpretation of the law inappropriate. Put another way, the regulations clearly intend for this Board, not the Division, to decide finally at the administrative level how to interpret the law applicable to the processing and approval of coal mining permit applications. The Board's review is to be conducted *de novo* for reasons stated at length in the *Lila Canyon* order, and deference to the Division's legal interpretations would be entirely inconsistent with the fresh look that the Board has found mandatory under the applicable statutes, regulations, and case law.

Happily enough, this comports with practice under the federal regulations governing administrative review of permitting decisions under the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 ("SMCRA"). *See Save Our Cumberland Mountains, Inc. v. Office of Surface Mining Reclamation & Enforcement*, No. NX-97-3-PR (U.S.D.O.I. – O.H.A. July 30, 1998) ("the *SOCM* decision) at 21-22 (rejecting argument that a federal administrative law judge (ALJ) or administrative appeals board must defer to interpretations of SMCRA and its governing regulations by the Office of Surface Mining Reclamation and Enforcement ("OSM") in reviewing

permit approval decisions).[2] The Secretary of the Interior approved the Utah statutes and regulations that govern proceedings such as this one based on a finding that the prescribed procedures are "in accordance with [30 U.S.C. § 1275] and subchapter L of [30 C.F.R. Chapter VII]." 30 C.F.R. § 732.15(b)(14); *see also id.* § 730.5 (defining "*in accordance with*"). This Board is legally bound to interpret Utah law consistently with federal interpretation of SMCRA and its implementing regulations so as to maintain Utah's "primacy" under SMCRA. *See Brown v. Red River Coal Co.*, 373 S.E.2d 609, 610 (Va. App. 1988) ("Federal legislative history and interpretation must control construction of the state law in these circumstances as a matter of simple federal preemption. A common tenet of modern federalism holds that in substantive areas preempted by the federal government, such as coal surface mine reclamation, states may not enact laws that are less restrictive than or inconsistent with the federal law."); Syl. pt. 8, *Schultz v. Consolidation Coal Co.*, 197 W.Va. 375, 475 S.E.2d 467 (1996) ("a state regulation enacted pursuant to WVSCMRA must be read in a manner consistent with federal regulations enacted in accordance with SMCRA"); *see also* Syl. pt. 1, *Canestraro v. Faerber*, 179 W. Va. 793, 374 S.E.2d 319 (1988); *Cogar v. Sommerville*, 180 W. Va. 714, 379 S.E.2d 764 (1989); Syl. pt. 1, *Russell v. Island Creek Coal Co.*, 182 W. Va. 506, 389 S.E.2d 194 (1989); *Rose v. Oneida Coal Co., Inc.*, 195 W.Va. 736, 466 S.E.2d 794, 798 (1995). Like ALJ Sweitzer in the *SOCM* case, then, this Board should address the substantive issues in this case *de novo*, except to the extent that substantial technical analysis is involved, without deference to the Division's interpretations of the law.

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[2] Petitioners attach a copy of this decision as Exhibit 1 to this brief.

IV.

The Board May Defer to the Division's Technical Analyses and Findings Only When the Evidence Is In Equipoise

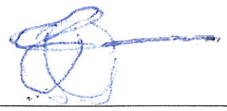
As ALJ Sweitzer noted in the *SOCM* case, "'[i]t is well settled that the Secretary is entitled to rely upon the expertise of his technical experts, and absent showing of error by a preponderance of the evidence, a mere difference of opinion with the expert will not suffice to reverse the reasoned opinions of the Secretary's technical staff.'" *SOCM* at 20, quoting *American Gilsonite Co.*, 111 IBLA 1, 33 (1989). Petitioners acknowledge, then, that where the Board finds that the evidence bearing on a dispute regarding the Division's technical analyses or findings is in equipoise – that is, where the Board finds equal merit in Petitioners' evidence on a technical issue and the opposing evidence that the Division presents through **its** technical experts on that issue, the Board may lawfully defer to the Division's experts. Petitioners note, however, that the evidence on technical issues is rarely in equipoise and that the most meaningful point on this issue is that Petitioners bear no more than the traditional plaintiff's burden of proving error by a preponderance of the evidence. This they most certainly will do.

Conclusion

For the reasons stated above, Petitioners request that the Board reaffirm and apply the scope of review principles announced in the *Lila Canyon* order, refuse to defer to the Division's interpretations of law, and make clear that it will defer to the Division's technical experts only on issues where the Board finds the evidence in equipoise.

Dated: December 29, 2009

Respectfully submitted,

By: 

Attorneys for Utah Chapter of the Sierra Club, *et al.*.

Stephen H.M. Bloch #7813
Tiffany Bartz #12324
SOUTHERN UTAH WILDERNESS ALLIANCE
425 East 100 South
Salt Lake City, UT 84111
Telephone: (801) 486-3161

Walton Morris *pro hac vice*
MORRIS LAW OFFICE, P.C.
1901 Pheasant Lane
Charlottesville, VA 22901
Telephone (434) 293-6616

Sharon Buccino *pro hac vice*
NATURAL RESOURCES DEFENSE COUNCIL
1200 New York Ave., NW, Suite 400
Washington, DC 20005
Telephone: (202) 289-6868

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of December, 2009, I served a true and correct copy of **PETITIONERS' BRIEF ON THE SCOPE OF REVIEW** to each of the following persons via electronic mail:

Denise Dragoo, Esq.
James P. Allen, Esq.
Snell & Wilmer, LLP
15 West South Temple, Suite 1200
Salt Lake City, UT 84101
ddragoo@swlaw.com
jallen@swlaw.com

Bennett E. Bayer, Esq. *(Pro Hoc Vice)*
Landrum & Shouse LLP
106 West Vine Street, Suite 800
Lexington, KY 40507
bbayer@landsrumshouse.com

Steven Alder, Esq.
Utah Assistant Attorney General
1594 West North Temple
Salt Lake City, UT 84114
stevealder@utah.gov

Michael Johnson, Esq.
Assistant Attorney General
160 East 300 South, 5th Floor
P.O. Box 140857
Salt Lake City, UT 84114-0857
mikejohnson@utah.gov

William L. Bernard, Esq.
Deputy Kane County Attorney
76 North Main Street
Kanab, UT 84741
attorneyasst@kanab.net